ATTORNEY FOR APPELLANT:

ALISON T. FRAZIER
Dupont, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

BARBARA A. NARDI
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KRISTOPHER McKINLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A04-0612-CR-711
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable G. Michael Witte, Judge
Cause No. 15D01-0511-FC-27

August 2, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Kristopher McKinley appeals his sentence for operating a vehicle while intoxicated causing death as a class C felony.[1] McKinley raises two issues, which we revise and restate as:

I. Whether the trial court abused its discretion in sentencing Clay; and

II. Whether Clay's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.

The relevant facts follow. On September 21, 2005, McKinley was driving on a state road in Dearborn County when he swerved to avoid an oncoming vehicle. When McKinley overcorrected his vehicle, it rolled over and crashed. Adam McCarthy, a passenger in McKinley's vehicle, died from injuries sustained in the crash. McKinley's mother, also a passenger, was ejected from the vehicle and was seriously injured. Prior to the accident, McKinley, McKinley's mother, and McCarthy had been drinking at a local tavern. McKinley's blood alcohol content at the time of the crash was determined to be .113%.

On November 1, 2005, the State charged McKinley with operating a vehicle while intoxicated causing death as a class C felony, operating a vehicle with .08 BAC causing death as a class C felony,[2] operating a vehicle while intoxicated causing serious bodily

---

[1] Ind. Code § 9-30-5-5(a)(3) (Supp. 2005).

[2] Ind. Code § 9-30-5-5(a)(1)(A) (Supp. 2005).

injury as a class D felony,[3] and operating a vehicle with .08 BAC causing serious bodily injury as a class D felony.[4] On May 1, 2006, McKinley pleaded guilty to operating a vehicle while intoxicated causing death as a class C felony, and the State dismissed the other charges. The plea agreement left the sentencing to the trial court's discretion.

At the sentencing hearing, McKinley asked the trial court to consider the following mitigating factors: (1) McKinley had pleaded guilty; (2) he was remorseful; (3) he would endure undue hardship, if imprisoned, because of his physical disabilities; and (4) he was responding well to rehabilitation. The trial court found McKinley's plea agreement to be the sole mitigating factor and found McKinley's criminal history to be the sole aggravating factor. The trial court sentenced McKinley to serve eight years in the Indiana Department of Correction with one year suspended for the guilty plea.

We note that McKinley's offense was committed after the April 25, 2005, revisions of the sentencing scheme.[5] In clarifying these revisions, the Indiana Supreme Court has held that "the trial court must enter a statement including reasonable detailed reasons or circumstances for imposing a particular sentence." Anglemyer v. State (filed

---

[3] Ind. Code § 9-30-5-4(a)(3) (2004).

[4] Ind. Code § 9-30-5-4(a)(1)(a) (2004).

[5] Indiana's sentencing scheme was amended effective April 25, 2005, to incorporate advisory sentences rather than presumptive sentences. See Ind. Code § 35-50-2-5 (Supp. 2005). Under the amended sentencing scheme, trial courts "may impose any sentence that is . . . authorized by statute . . . and . . . permissible under the Constitution of the State of Indiana . . . regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d) (Supp. 2005).

June 26, 2007), Ind. No. 43S05-0606-CR-230, slip op. at 11. The reasons given, and the omission of reasons arguably supported by the record, are reviewable on appeal for abuse of discretion. Id. The relative weight or value assignable to reasons properly found or those which should have been found is not subject to review for abuse of discretion. Id. Appellate review of the merits of a sentence may be sought on the grounds outlined in Ind. Appellate Rule 7(B). Id.

I.

The first issue is whether the trial court abused its discretion in sentencing McKinley. McKinley argues that the trial court failed to assign the appropriate mitigating weight to his guilty plea. McKinley also argues that the trial court failed to find other significant mitigators such as: his physical disability, the undue hardship of imprisonment to his children, and his active involvement in rehabilitation.

"The finding of mitigating factors is not mandatory and rests within the discretion of the trial court." O'Neill v. State, 719 N.E.2d 1243, 1244 (Ind. 1999). The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Gross v. State, 769 N.E.2d 1136, 1140 (Ind. 2002). "Nor is the court required to give the same weight to proffered mitigating factors as the defendant does." Id. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Sherwood v. State, 749 N.E.2d 36, 38 (Ind. 2001), reh'g denied. However, the trial court may "not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may

imply that the trial court failed to properly consider them." Id. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999).

1. Guilty plea

McKinley argues that the trial court failed to assign the appropriate mitigating weight to his guilty plea. Specifically, he contends that the trial court should have imposed a sentence less than the maximum, rather than the maximum sentence with one year suspended, as a substantial benefit for the plea. McKinley asks us to review the weight given to a mitigating factor for abuse of discretion, which we cannot do. See Anglemyer v. State (filed June 26, 2007), Ind. No. 43S05-0606-CR-230, slip op. at 11 (holding that the relative weight or value assignable to aggravating and mitigating factors properly found or those which should have been found is not subject to review for abuse of discretion).

2. Undue Hardship of Imprisonment with Physical Disabilities

McKinley argues that he suffers from physical disabilities that would render imprisonment an undue hardship for him. We find Moyer v. State, 796 N.E.2d 309 (Ind. Ct. App. 2003), instructive. In Moyer, the defendant was convicted of four counts of dealing in a controlled substance. On appeal, the defendant argued, in part, that the trial court should have considered his illness as a significant mitigating circumstance. We agreed, noting that:

> Moyer testified at length about the medical hardships that he would endure if incarcerated. He suffers from lymphoma, malignancy of the larynx, and recurring tumors. He also has pulmonary disease and relies on a breathing apparatus. Moyer requires frequent tracheal cleanings and sterile catheters, which the jail cannot provide regularly. The record clearly demonstrates that Moyer is seriously ill and requires constant medical attention; therefore, we conclude that the trial court abused its discretion in not considering Moyer's illness as a significant mitigating circumstance.

Id. at 314.

Here, although McKinley suffers from chronic bone pain, brain shear, wears a platform boot, and has steel rods in his arm and leg because of a prior automobile accident, the record does not indicate that his ailments require the constant medical attention envisioned in Moyer. We cannot say that the trial court abused its discretion by not considering McKinley's physical disabilities as a mitigating factor. See Henderson v. State, 848 N.E.2d 341, 344 (Ind. Ct. App. 2006) (holding that the "trial court did not err in declining to consider [defendant]'s poor health to be a mitigating circumstance").

3. Undue Hardship to his Children

McKinley argues that imprisonment will result in undue hardship to his children. McKinley failed to raise this circumstance as a proposed mitigator before the trial court. Thus, he is precluded from advancing it on appeal. See Pennington v. State, 821 N.E.2d 899, 905 (Ind. Ct. App. 2005) (holding that the defendant is precluded from advancing proposed mitigators for the first time on appeal).

4. Active Involvement in Rehabilitation

McKinley argues that the trial court should have considered his active involvement in his own rehabilitation, specifically, his attendance at Alcoholics Anonymous meetings, as a mitigator. The trial court directly addressed this issue. During the hearing, McKinley referred to his blood alcohol level of .113% as "rather low." Transcript at 34. McKinley also suggested that a seizure or involuntary action had caused the accident. McKinley was unwilling to admit that he had an alcohol problem when questioned about his prior offenses with alcohol. From this testimony, the trial court concluded that "no matter how much he's trying to convince the Court that he's going to AA and that he's buying into alcohol abuse or alcoholism . . . he really isn't." Id. at 58. Thus, we cannot say that the trial court abused its discretion by overlooking McKinley's involvement in rehabilitation. See, e.g., Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002) (holding that the trial court did not overlook or fail to consider the mitigating factors urged by the defendant).

II.

The next issue is whether McKinley's sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that McKinley was driving on a state road in Dearborn County when he swerved to avoid an oncoming vehicle. When McKinley overcorrected his vehicle, it rolled over and crashed. Adam McCarthy, a passenger in McKinley's vehicle, died from injuries sustained in the crash, and McKinley's mother, also a passenger, was ejected from the vehicle and seriously injured. McKinley's blood alcohol content at the time of the crash was determined to be .113%.

Our review of the character of the offender reveals that McKinley was convicted four times for alcohol related offenses in the years leading up to the crash: two convictions for possession of alcohol by a minor in 1998, convictions for public intoxication and resisting law enforcement in 2000, and another conviction for public intoxication in 2002. Reflecting on these prior convictions, McKinley was unwilling to admit that he had a problem with alcohol. He referred to his blood alcohol level of .113% at the time of the crash as "rather low" and suggested that a seizure caused him to lose control of the vehicle. Transcript at 34.

After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender. See, e.g., Gillem v. State, 829 N.E.2d 598, 607 (Ind. Ct. App. 2005) (holding that the defendant's enhanced sentences for causing death when operating a motor vehicle with a blood-alcohol content of .08 or higher were not inappropriate), trans. denied.

For the foregoing reasons, we affirm McKinley's sentence for operating a vehicle while intoxicated causing death as a class C felony.

Affirmed.

MAY, J. and BAILEY, J. concur